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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. RONALD A. WARD, Defendant and Appellant.	B200354 (Los Angeles County Super. Ct. No. BA311874)

APPEAL from a judgment of the Superior Court of Los Angeles County. Frederick N. Wapner, Judge. Reversed and remanded with directions.

Lise M. Breakey, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Lauren E. Dana, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of part I of the Discussion.

Ronald Ward, convicted of sale of a controlled substance (Health & Saf. Code,[1] § 11352, subd. (a)) and possession of cocaine base for sale (§ 11351.5), appeals his conviction and sentence, contending that his motion for discovery of police officers' personnel records should have been granted and that section 11351.5 violates his constitutional rights to due process and equal protection of the laws. We reject Ward's due process and equal protection claims but hold that the trial court should have conducted an in camera review of documents pertaining to two police officers. Accordingly, we conditionally reverse the conviction and remand for further proceedings on the discovery motion.

FACTUAL AND PROCEDURAL BACKGROUND

On November 1, 2006, Los Angeles Police Department narcotics officer Alonzo Williams, wearing a one-way transmitter, approached a man named Derrick Sutton on Ceres Street in an area known for drug sales. Sutton asked Williams what he needed, and Williams responded that he needed a dime, or $10 worth of narcotics. Sutton, apparently suspicious of Williams, said he would not make a sale until he saw Williams smoke a pipe of drugs. Williams refused and was beginning to walk away when Ward approached.

As Ward walked past Williams, Sutton said to Ward, "Serve him a dime." Williams stopped walking and turned toward Ward, who reached into his right pocket and instructed Williams to drop the money on the ground. Williams dropped the money as directed, on a green tent, and Ward threw a plastic-wrapped rock of what appeared to be cocaine base. Ward pointed at the item he threw and told Williams that it was right there. Williams picked up the object, walked away, and gave other officers a signal that he had completed a buy.

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[1] Unless otherwise indicated, all further statutory references are to the Health and Safety Code.

Officers arrested Sutton and Ward. From Sutton the police recovered $477 in cash and the marked $10 that Williams had dropped to pay for the drugs he purchased. Police found various bills and two glass pipes on Ward, and they recovered 13 pre-wrapped off-white solids, approximately the same size as the one given to Williams, that they had seen Ward toss at the time that the police arrived.

Ward was charged with sale of a controlled substance and with possession of cocaine base for sale. Prior to trial, Ward sought to discover information about complaints filed about or investigations of 19 different officers involved in the undercover operation with respect to acts of moral turpitude, including false arrests, planting evidence, illegal searches and seizures, dishonesty, fabrication of evidence, fabrication of police reports, fabrications of probable cause, false testimony, or perjury. After a hearing, the court denied the discovery motion.

At trial, Williams testified about the transaction. Police detective Vip Kanchanamongkol (who had searched Sutton) identified Sutton, testified as to the search he performed, and opined that a person who was observed to sell rock cocaine and who possessed 13 similar packages, $55 in small bills, and two glass pipes in a high narcotics area was likely to possess the drugs for the purposes of sale.

Police officer Hector Diaz testified that he watched Williams and Sutton have a brief conversation, that Ward approached and spoke with Sutton and then with Williams, and that he saw Williams place something down on a green tent. He then saw Ward throw something to the ground that Williams then picked up; Williams walked away and Sutton picked up the item Williams had placed on the green tent. Diaz directed the uniformed officers to come to the scene, and as the patrol cars arrived, he saw Ward walk to a blue tarp and discard an unknown number of off-white solids. Diaz directed detective Sylvia Ruize to recover those items. Ruize testified that she photographed the rocks on the blue tarp and then collected them.

Officer Daniel Diaz testified that he arrived on the scene after Sutton and Ward had been arrested and that he found a bill in the $477 that was handed to him that matched the bill photocopied in advance by Williams. Officer Michael Simon testified

that he and his partner were the ones who detained Ward and that he had searched him, recovering $54 and two pipes.

Criminalist Aaron McElrea testified that the rocks collected by the police were in fact cocaine base.

Ward was convicted as charged. He appeals.

DISCUSSION

I. Pretrial Discovery

A party seeking discovery from a peace officer's personnel records through what is called a *Pitchess* motion (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*)) must comply with Evidence Code sections 1043 through 1047. "[T]he *Pitchess* motion must describe 'the type of records or information sought' (Evid. Code, § 1043, subd. (b)(2)) and include '[a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records' (*id.*, subd. (b)(3)). The affidavits may be on information and belief and need not be based on personal knowledge ([*City of*] *Santa Cruz* [*v. Municipal Court* (1989)] 49 Cal.3d [74,] 86), but the information sought must be requested with sufficient specificity to preclude the possibility of a defendant's simply casting about for any helpful information (*id.* at p. 85)." (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226.)

To set forth the materiality of the information sought, the affidavits must "provide a 'specific factual scenario' establishing a 'plausible factual foundation'" for the moving party's allegation of police misconduct. (*City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1146.) In *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1026 (*Warrick*), the Supreme Court held that "a plausible scenario of officer misconduct is one that might or could have occurred. Such a scenario is plausible because it presents an

assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges." We review the ruling on a *Pitchess* motion for an abuse of discretion. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039.)

Here, Ward's attorney's declaration set forth that Ward "denies he ever approached anyone and stated 'drop the money on the ground' or 'it's right here' tossing a small rock on the ground." The declaration continued, "Defendant admits shortly before being arrested he had just been with a lady friend nicknamed 'Cee' who had just given him approximately $60.00 which was the source of the $54.00 the police found on him. [¶] After 'Cee' gave him the money, defendant went to a liquor store located at Ceres and 8th Streets. [¶] After purchasing three beers, he proceeded to walk back to 'Cee' towards 7th Street and consumed the three beers, at which time two patrol cars approached. Police officers exited their cars and detained defendant informing him he was under a narcotics investigation. At the time he was detained, there were several other black males next to him walking on the street." Ward admitted that he was searched and that he had the money and the two pipes with him, but denied possessing "any rock cocaine or placing rock cocaine anywhere." Ward's counsel stated, "Defendant admits he is an addict and in the area smoking and buying rocks for his personal use and habit." According to Ward's attorney, the defense expected the information about investigations and complaints against the police officers "to show that the events leading up to defendant's arrest as described in the police report are false and that the officers fabricated parts of the police report." Ward's attorney indicated that the information gathered would be used to impeach the officers and to show a custom and habit of acting outside the law.

At the hearing on the discovery motion, Ward's counsel offered additional information to support the motion.[2] He explained, "I can explain what—what Mr. Ward

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[2] We may consider this information in assessing whether the defendant has established good cause for the in camera document review. (*Warrick*, *supra*, 35 Cal.4th at p. 1026.)

was doing for a period of approximately 20 minutes while he's drinking beer and where he is and who he was with." Ward's counsel said, "[A]fter purchasing the beers, [he] received a—walked back to 'C[ee]' toward 7th Street. Met 'C[ee],' stood for 20 minutes talking to 'C[ee]' drinking the beers, and then sat down talking to 'C[ee]' for another 20 minutes when they were approached drinking the beers. When the–he's approached by the police officers." The trial court denied the motion on the ground that the basis for the trial court's denial of the motion was that the factual scenario described, either in the declaration or with the additional informal offer of proof made at the hearing, was not sufficiently plausible.

We conclude that the trial court abused its discretion in refusing to conduct an in camera hearing concerning records pertaining to officers Williams and Hector Diaz.[3] Ward offered a plausible scenario presenting "an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges." (*Warrick*, *supra*, 35 Cal.4th at p. 1026.) Defense counsel's declaration and supplemental assertions of what he would amend the declaration to say, set forth this defense: Ward, an admitted drug user, was in the neighborhood to buy drugs for his own use, and was sitting around talking with a friend and drinking beer when the police arrested him. He denied possessing drugs for sale or discarding them and accounted for the money recovered from him and the pipes he was carrying, thereby in essence denying the charges against him. The declaration implied two possible understandings of what happened when the police arrived: The declaration stated that there were other Black men near him at the time of the arrest, suggesting a possibility that the officers may have mistaken him for the actual participant, but also asserted that the police had made false

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[3] While trial counsel requested the records of all 19 officers who participated in the narcotics operation, Ward acknowledges on appeal that it is really Williams and Diaz who are implicated here—Williams as the undercover purchaser of the drugs and Diaz as the officer who testified to having seen Ward toss the drugs aside when the uniformed police arrived.

statements about the events leading up to defendant's arrest and that the officers fabricated parts of the police report.

With this declaration, Ward accounted for his actions, which did not involve drug sales, and he did not merely assert that the police lied and fabricated charges. Accordingly, Ward showed good cause for an in-chambers review of potentially relevant personnel records of Williams and Diaz, and the trial court abused its discretion when it refused to conduct an in camera review of the relevant records relating to the two officers.

In arguing that the motion was properly denied, the Attorney General refers to *People v. Thompson* (2006) 141 Cal.App.4th 1312, 1316-1317, but that case is clearly distinguishable. There, the defendant put forth a declaration that was internally inconsistent and incomplete and presented neither a factual account of the scope of the alleged police misconduct nor explained the defendant's actions in a manner that adequately supported his defense. (*Ibid*.) The showing here was not similarly deficient.

Ward also argues that any evidence of moral turpitude, false arrest, planting evidence, illegal search and seizure, dishonesty, fabrication, or perjury pertaining to the officers that was not disclosed was clearly material under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*), would probably have resulted in an acquittal or hung jury, and would require reversal of the conviction. This argument is purely hypothetical. We do not have any information that there exists evidence of such conduct by the officers in question, yet we are asked to rule that if there were such evidence it would be material and it would constitute a due process violation.

Ward does not make it clear what remedy he believes himself to be entitled to for this asserted potential *Brady* violation (*Brady v. Maryland*, *supra,* 373 U.S. 83): Although the heading to this portion of Ward's appellate brief argues that reversal is required because a different outcome was reasonably possible, the text of the argument contradicts that with the assertion that withholding of material *Brady* information is reversible per se, regardless of whether another outcome was likely in the absence of the violation; Ward then proceeds to discuss the remedy for a *Pitchess* error, requesting

"reversal and remand for *in camera* examination of the records of Officers Williams and Diaz, and further proceedings consistent with the trial court's findings." As Ward has not established any *Brady* violation but has in fact demonstrated an abuse of discretion in the ruling on the *Pitchess* motion, we follow the procedure set forth in *People v. Hustead* (1999) 74 Cal.App.4th 410, 419: "[W]e will remand the case to the trial court to conduct an in camera hearing on the discovery motion. If there is no discoverable information in the file, then the trial court is ordered to reinstate the original judgment and sentence, and the judgment is ordered affirmed. [Citation.] If, however, there is relevant discoverable information in the officer[s'] file . . . appellant should be given an opportunity to determine if the information would have led to any relevant, admissible evidence that he could have presented at trial. [Citation.] If appellant is able to demonstrate that he was prejudiced by the denial of the discovery, the trial court should order a new trial. If appellant is unable to show any prejudice, then the conviction is ordered reinstated, and the judgment is ordered affirmed."

II. Equal Protection and Due Process

Ward contends that the higher statutory sentence for possession for sale of cocaine base (§ 11351.5) versus possession for sale of powder cocaine (§ 11351) violates substantive due process and his right to equal protection of the laws. He argues that the distinction does not rationally serve a legitimate state interest (violating substantive due process) and does not serve a compelling state interest (failing strict scrutiny and violating equal protection).

The federal and state equal protection clauses (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7) prohibit the state from arbitrarily discriminating among people subject to its jurisdiction. The guarantee has been defined to mean that all persons under similar circumstances are entitled to and given equal protection and security in the enjoyment of personal and civil rights and the prevention and redress of wrongs. (*People v. Rhodes* (2005) 126 Cal.App.4th 1374, 1383.) Those who are similarly situated with respect to

the purpose of the law shall receive similar treatment. (*Ibid*.) "'"Under the equal protection clause, '[a] classification "must be reasonable, not arbitrary, and must rest upon some grounds of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."'" [Citations.]' [Citation.]" (*Ibid*.) The equal protection guarantee, "'however, does not prevent the state from drawing distinctions between different groups of individuals but requires the classifications created bear a rational relationship to a legitimate public purpose.' [Citation.]" (*People v. Chavez* (2004) 116 Cal.App.4th 1, 4.)

Ward contends, citing *People v. Olivas* (1976) 17 Cal.3d 236, that because his liberty is involved here we should apply strict scrutiny in reviewing his equal protection claim. While *People v. Olivas* did hold that "personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and United States Constitutions" (*id*. at p. 251), the California Supreme Court has subsequently rejected the argument that the *Olivas* decision means that strict scrutiny is applied "whenever one challenges upon equal protection grounds a penal statute or statutes that authorize different sentences for comparable crimes, because such statutes always implicate the right to 'personal liberty' of the affected individuals." (*People v. Wilkinson* (2004) 33 Cal.4th 821, 837.) Instead, the Supreme Court has said that the rational basis test applies to equal protection challenges based on sentencing disparities. (*Id.* at p. 838; see also *U.S. v. Harding* (9th Cir. 1992) 971 F.2d 410, 412 (*Harding*) [applying a rational basis test on equal protection review of federal law imposing a higher punishment for possession of cocaine base than cocaine powder] *U.S. v. Thomas* (4th Cir. 1990) 900 F.2d 37, 39 [same].)

Ward's due process argument leads to the same inquiry: a rational basis review of the law. "Substantive due process . . . deals with protection from arbitrary legislative action, even though the person whom it is sought to deprive of his right to life, liberty or property is afforded the fairest of procedural safeguards. In substantive law such deprivation is supportable only if the conduct from which the deprivation flows is prescribed by reasonable legislation reasonably applied, i.e., the law must not be

unreasonable, arbitrary or capricious but must have a real and substantial relation to the object sought to be attained." (*Gray v. Whitmore* (1971) 17 Cal.App.3d 1, 21.) "The test of legislation under the due process clause of the Constitution is that there be some evidence on the basis of which the Legislature could enact the statute. [Citations.] Accordingly, no valid objection to the constitutionality of a statute under the due process clause may be interposed 'if it is reasonably related to promoting the public health, safety, comfort, and welfare, and if the means adopted to accomplish that promotion are reasonably appropriate to the purpose.' [Citations]." (*People v. Aguiar* (1968) 257 Cal.App.2d 597, 602.)

The Supreme Court has recognized the strong presumption that legislative enactments must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears. (*People v. Morgan* (2007) 42 Cal.4th 593, 605.) Ward has not made a showing that would defeat this presumption. Ward's entire argument that the statutory scheme is unconstitutional turns on the idea that the drugs are the same, so that possessing cocaine base and cocaine powder are identical crimes punished differently. Both cocaine base and cocaine powder are, of course, forms of cocaine (*People v. Howell* (1990) 226 Cal.App.3d 254, 261), but they are not chemically identical, as noted by the court in *People v. Adams* (1990) 220 Cal.App.3d 680, 686 and implicitly conceded by Ward when he asserts that cocaine base is cocaine powder cooked with baking soda. The two substances, while related, are not the same: "Suffice to note, cocaine base is not cocaine hydrochloride although both substances are cocaine." (*Howell*, at p. 261.) The Legislature has elected to treat these related compounds (*ibid*.) as different drugs. In California's version of the Uniform Controlled Substances Act, California adopted the five schedules of controlled substances used in federal law and the Uniform Act. (2 Witkin and Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 64, p. 573.) Cocaine base is a Schedule I narcotic (§ 11054, subd. (f)(1)),

while powder cocaine is a Schedule II drug. (§ 11055, subd. (b)(6).)[4] As the two drugs are not the same, Ward's argument that the distinct punishments for possessing each substance are "[d]ifferent and disproportionate penalties [that] may not be imposed for the same crime" is contradicted by the facts.

To support his argument that the statutory scheme is unconstitutional, Ward relies on a bill introduced in the State Assembly (Assem. Bill No. 337 (2007-2008 Reg. Sess.)) to amend the Health and Safety Code to equalize punishments for powder cocaine and cocaine base. This bill, like others before it (Assem. Bill No. 125 (2005-2006 Reg. Sess.), Assem. Bill No. 2274 (2003-2004 Reg. Sess.)), died without being enacted. (Current Bill Status, Assem. Bill No. 337, Official California Legislative Information Web site < http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0301-0350/ab_337_bill_20080206_status.html> [as of September 23, 2008].) Even if the Legislature does at some point choose to make the punishments equal for these two crimes, such a change in the law would not mean that there was no rational basis for a legislative scheme that treats possession of the two drugs differently.

Numerous federal cases have rejected the argument that the distinction between the two forms of cocaine is irrational, and we believe these cases are persuasive. We agree with the court in *Harding*, *supra*, 971 F.2d at page 413, when it explained, "Although crack and powder cocaine are different forms of the same drug, the routes of administration, their physiological and psychological effects, and the manner in which

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[4] Although California has not adopted the portion of the Uniform Controlled Substances Act that sets forth the tests prescribed for inclusion of substances in the schedules, the drugs in Schedule I have (1) a high potential for abuse and (2) no accepted medical use in treatment or lack accepted safety for use in treatment under medical supervision. (*People v. Sherman* (1997) 57 Cal.App.4th 102, 105.) Schedule II drugs also have a high potential for abuse, but have a currently accepted medical use in treatment in the United States, or a currently accepted medical use with severe restrictions; abuse of the substance may lead to severe dependence. (2 Witkin and Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 64, p. 574.)

they are sold set the two forms of the drug apart. Crack is normally smoked in a glass pipe, while powder cocaine is most often ingested nasally. Because it is smoked, crack has a quicker and more intense effect on the brain than powder cocaine ingested nasally, causing a greater desire for more. Crack is also sold in smaller quantities and lower unit prices than powder cocaine, thereby reducing the financial barrier which had previously limited cocaine usage. [Citations.]

"In short, crack offers an easy, relatively inexpensive, and potent means for first-time users as well as addicts to experience a temporary high which leaves them craving more. [Citation.] While powder cocaine was the drug of choice for the affluent, crack has brought cocaine to the streets, catering to the habits of both rich and poor in epidemic proportions. [Citation.] The extent of this epidemic can be demonstrated by the development among police forces of special anticrack units. . . ." (Footnotes omitted.)

The *Harding* court concluded, "The distinction between crack and powder cocaine is neither arbitrary nor irrational. In *United States v. Shaw*, 936 F.2d 412, 416 (9th Cir. 1991) and *United States v. Van Hawkins*, 899 F.2d 852, 854 (9th Cir. 1990), we held that the distinction between cocaine base and powder cocaine . . . is not unconstitutionally vague because the two substances are objectively distinguishable. Furthermore, the penalties embodied in this statute legitimately further the important government interest of eliminating controlled substance distribution and abuse. Crack presents a much larger problem than powder cocaine, both in the number of users and the drug's effects on the individual. [Citation.] If the extent of the problem posed by the sale of crack and the need for more severe penalties than for powder cocaine are not clearly evident, these issues are at least highly debatable. This is enough to prevent invalidation of the statutory classification. [Citation.]" (*Harding*, *supra*, 971 F.2d at p. 414.)

We are by no means insensible to the disparities that result from the legislative decision to treat these two drugs differently for penal purposes. These disparities have been discussed extensively at the federal level. (See, e.g., *Kimbrough v. U.S.* (2007) ___ U.S. ___, 128 S.Ct. 558, 566 [differential treatment of cocaine base and powder cocaine under former sentencing guidelines "yields sentences for crack offenses three to six times

longer than those for powder offenses involving equal amounts of drugs. . . . This disparity means that a major supplier of powder cocaine may receive a shorter sentence than a low-level dealer who buys powder from the supplier but then converts it to crack"]; *U.S. v. Armstrong* (1996) 517 U.S. 456, 469 [United States Sentencing Commission "statistics show: More than 90% of the persons sentenced in 1994 for crack cocaine trafficking were black . . ."]; *id*. at pp. 478-480 (dis. opn. of Stevens, J.) [citing statistic that sentences for crack offenders average three to eight times longer than sentences for comparable powder offenders and observing that the higher penalties for crack cocaine offenses versus powder cocaine offenses are a primary cause of racial disparities in sentencing between Black and White criminal federal court defendants]). The differential outcomes and attendant consequences may motivate legislative action, but they do not establish that there is no rational basis for distinguishing between cocaine powder and cocaine base for sentencing purposes.

As there is rational support for the Legislature to enact the statutes, Ward has not established a due process violation here. (See *People v. Aguiar*, *supra*, 257 Cal.App.2d at p. 602.) Because Ward has not made a showing that the law treats two similarly situated groups in an unequal manner, he has not demonstrated an equal protection violation. "If persons are not similarly situated for purposes of the law, an equal protection claim fails at the threshold. [Citation.]" (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1155.)

DISPOSITION

The judgment is reversed. The cause is remanded to the trial court with directions to conduct an in camera hearing on Ward's *Pitchess* motion with respect to Officers Williams and Diaz. If the trial court finds there are discoverable records, they shall be produced and the court shall permit Ward an opportunity to demonstrate prejudice and order a new trial if there is a reasonable probability the outcome would have been different had the information been disclosed. If the court finds there are no discoverable records, the court shall reinstate the judgment of conviction.

CERTIFIED FOR PARTIAL PUBLICATION.

ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.